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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. ~~1173~~ ~~803~~ ~~977~~ 53

LEVI SCOTT AND THE FARMERS' AND MERCHANTS' STATE BANK, PLAINTIFFS IN ERROR,

vs.

DAVID ARMSTRONG, RECEIVER OF THE FIDELITY NATIONAL BANK OF CINCINNATI, OHIO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED JULY 10, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1173.

LEVI SCOTT AND THE FARMERS' AND MERCHANTS' STATE BANK, PLAINTIFFS IN ERROR,

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DAVID ARMSTRONG, RECEIVER OF THE FIDELITY NATIONAL BANK OF CINCINNATI, OHIO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 11, 1889.

1 At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, O., in said district, on the first Tuesday of October, being also the second day of that month, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and thirteenth—present, the Honorable George R. Sage, district judge—among the proceedings had were the following, to wit:

DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio, Plaintiff,
vs.
LEVI SCOTT and FARMERS' AND MERCHANTS' STATE BANK, Defendants.
} No. 4067.

For money.

Be it remembered that heretofore, to wit, on the 19th day of October, in the year of our Lord one thousand eight hundred and eighty-seven, came the plaintiff, by his attorneys, and filed in the clerk's office of said court the following petition, clothed in the words and figures following, to wit:

Petition.

2 United States Circuit Court, Southern District of Ohio, Western Division.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio, Plaintiff,
vs.
LEVI SCOTT and FARMERS' AND MERCHANTS' STATE BANK, Defendants.

The plaintiff, David Armstrong, says that he is the duly appointed and qualified receiver of the Fidelity National Bank of Cincinnati, Ohio, which was a corporation organized under the laws of the United States and located at Cincinnati, Ohio, and that he is now engaged as such receiver in winding up the affairs of said bank, and for which purpose this suit is brought.

Plaintiff says that defendants are indebted to him on a note of which he is the holder and owner for value, as receiver as above mentioned, of a certain promissory note of which said defendant Levi Scott is maker and the defendant Farmers' and Merchants' State Bank the endorser, which is in words and figures as follows:

3 $10,000.00. CINCINNATI, O., *June 6th*, 1887.

Ninety days after date I promise to pay to the order of

Farmers' and Merchants' State Bank ten thousand dollars, at the Fidelity National Bank of Cincinnati, Ohio, value received, with interest after maturity, at the rate of eight per cent. per annum, until paid.

(Signed) LEVI SCOTT.

Said note being endorsed as follows: Pay Fidelity Nat'l Bank of Cincinnati, O., or order. Farmers' and Merchants' State Bank of Fairmount, Ind. Levi Scott. Signed Levi Scott, cashier.

Which said note was duly protested at its maturity for non-payment and notice thereof sent to said endorser.

Plaintiff says said note is past due and wholly unpaid.

Wherefore plaintiff prays judgment against said defendants in the sum of ten thousand dollars ($10,000.00) *dollars*, with interest thereon at the rate of eight (8) per cent. per annum from September 7, 1887, and for his costs.

E. W. KITTREDGE AND
W. B. BURNET,
Att'ys for Plaintiff.

STATE OF OHIO, *County of Hamilton*, } ss:

William B. Burnet makes oath and says that he is one of the attorneys for the plaintiff in the foregoing petition named; that said petition is founded upon a written instrument for the pay-
4 ment of money, and such instrument is in his possession, and the facts stated in the foregoing petition are true, as he verily believes.

W. B. BURNET.

Sworn to before me and subscribed in my presence this 18th day of October, A. D. 1887

FRANK DORGER,
Notary Public, Hamilton County, Ohio. [SEAL.]

And afterwards, to wit, on the 15th day of November, A. D. 1887, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer.

United States Circuit Court, Southern District of Ohio, Western Division.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio, Plaintiff,
vs.
LEVI SCOTT, FARMERS' AND MERCHANTS' STATE BANK, Defendants.

Separate answer of Levi Scott.

1st. Comes now Levi Scott, defendant herein, and, for his separate answer to plaintiff's complaint, says that he admits the execu-

tion of the note sued on and in plaintiff's complaint set out, and he owns that the sum [same] was so executed by him without any consideration whatever, and that the Fidelity National Bank of Cincinnati, Ohio, well knew the fact that the same was so executed, and at the time the same was so executed and at all times since, and took said note with full knowledge of the fact that the same was so executed without consideration.

2nd. For further separate answer defendant, Levi Scott, says that on the 6th day of June, 1887, his codefendant, The Farmers' and Merchants' State Bank of Fairmount, Indiana, was and still is a corporation doing a general banking business under and pursuant to the laws of the State of Indiana, and had been so engaged for one year prior to said day; that during all of said time he, the said defendant, was and still is cashier for said corporation, all of which the said Fidelity National Bank at all times well knew; that prior to said 6th day of June, 1887, said Farmers' and Merchants' State Bank, desiring to negotiate a loan of and from the said Fidelity National Bank, made to said bank its petition and request for such loan.

That it was then agreed by and between said banks that the said Farmers' and Merchants' State Bank should borrow of and from the Fidelity the sum of ten thousand dollars, and that the money so borrowed should be placed to the credit of the Farmers' and Merchants' State Bank at, with, and upon the books of the said Fidelity; that this defendant at no time had any interest in said loan, and in no manner procured the same upon his own account, all of which the Fidelity at the time well knew; that pursuant to said argument [agreement] the said Fidelity sent to the said Farmers' and Merchants' State Bank the note set out in plaintiff's complaint, at
6 the time requesting and directing that he, the said defendant, should sign the same in his individual capacity, and that the same should be endorsed by him as cashier of the Farmers' and Merchants' State Bank, which he, the said defendant, did; that the same was so signed and executed by him, except as to the date thereof, which was left blank, which blank was filled up by the said Fidelity Bank, after the same was returned to them by mail, with the knowledge of, and at the special instance and request of, the Fidelity National Bank, and that they took the same at the time well knowing that he, the said defendant, executed the same without consideration, and that it was the note only of the Farmers' and Merchants' State Bank.

Defendant avers that said note was delivered to the said Fidelity and the said ten thousand dollars, less the discount thereon, was by the said Fidelity placed to the credit of the said Farmers' and Merchants' State Bank, and that he, the said defendant, never in any manner received any part of the consideration for said note; that said note was so drawn payable to the order of the said Farmers' and Merchants' State Bank, and signed by him, at the request of the Fidelity and with their knowledge, and that no consideration of any kind or description ever passed to him from the said Farmers' and Merchants' State Bank or from the said Fidelity National Bank to him, and that the same was so executed by him without any consid-

eration, and that the said Fidelity National Bank well knew
7 that fact at the time it was so executed.

This defendant, having fully answered, asks to be dismissed with his costs.

PAXTON & WARRINGTON,
Att'ys for Defendant.

Verification waived.

D. ARMSTRONG,
Receiver, etc.,
By W. B. BURNET, *Att'y.*

And afterwards, to wit, on the 15th day of November, A. D. 1887, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer of Farmers' and Merchants' State Bank.

United States Circuit Court, Southern District of Ohio, Western Division.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio,

vs.

LEVI SCOTT, FARMERS' AND MERCHANTS' STATE BANK, Defendants.

Separate answer of Farmers' and Merchants' State Bank.

Comes now the defendant, Farmers' and Merchants' State Bank, and, for separate answer to plaintiff's complaint and by way of set-off, says that she now is and for more than one year last past has been a corporation duly organized under the laws of the State of
8 Indiana and doing a general banking business at the town of Fairmount, in the county of Grant and State of Indiana.

That she admits the execution and endorsement of the note sued on and in plaintiff's complaint set out in the manner following: That prior to the execution of the note sued on she made her application to the Fidelity National Bank, who was at the time engaged in a general banking business at the city of Cincinnati, for the loan of ten thousand dollars, which application was received by the Fidelity and accepted, and that it was then agreed by and between the Fidelity and this defendant that the said Fidelity would loan her, the said defendant, ten thousand dollars, and that she, the said defendant, should execute her promissory note therefor, and that the money so loaned should be placed on deposit at the Fidelity to the credit of her, the same defendant; that pursuant to said agreement the said Fidelity directed and requested that she, the said defendant, have her cashier, one Levi Scott, and a defendant in this action, sign said note as an individual and not as such cashier, and that the same be made payable to this defendant, and that the said Levi Scott as cashier endorse the same, as appears in plaintiff's com-

plaint, and that said note was so signed and returned to the Fidelity Bank without date, and that it came to said Fidelity on the 6th day of June, 1887, and that said bank united the date after said note was so received by them; that said note was so made, signed,
9 and endorsed, as appears, at the request of the said Fidelity National Bank, and was taken and received by them with full knowledge of the facts aforesaid.

That no consideration of any kind or description ever passed from this defendant to Levi Scott for said note, and that the same was at the time and still is the note of this defendant, all of which the Fidelity National Bank at the time they received said note well knew.

That the only consideration for said note was to this defendant.

That when said note was so received by the Fidelity, in consideration therefor the said Fidelity placed to the credit of this defendant the sum of $9,819.17, and that the same remained on deposit at said bank to meet any check or drafts made upon them by this defendant, and to pay and meet said note when the same became due; that afterwards this defendant drew her check of said Fidelity for the sum of $1,009.23, which was paid; that she then permitted the balance, to wit, the sum of $8,809.94, to remain with said Fidelity to meet a like amount to become due upon said note, and that the means of this defendant were being and have accumulated in a sum sufficient to take up and meet the balance of said note at maturity.

That at the time the receiver herein was appointed there remained in said Fidelity National Bank to the credit of this defendant to meet said note the sum of $8,809.94, which has in no manner been paid; that at the maturity of said note, and before the com-
10 mencement of this action, this defendant tendered to the receiver herein the sum of $1,190.06, the balance on said note, which tender was by the receiver, plaintiff herein, refused, and she, the said defendant, now brings into court for the plaintiff the sum of $1,190.06.

The defendant therefore prays that said sum, eight thousand nine & $\frac{24}{100}$ dollars, may be allowed it by way of counter-claim; that it may have judgment accordingly; that said receiver be ordered and directed to credit said sum on said note, and to receive said sum of $1,109.06, heretofore tendered to him, in full payment of the balance due on said note, and for such other and further relief as in equity this defendant may be entitled.

PAXTON & WARRINGTON,
Att'ys for Def't.

Verification waived.

D. ARMSTRONG, *Receiver*,
By W. H. BURNET, *Att'y.*

And afterwards, to wit, on the 5th day of March, A. D. 1888, the following demurrer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Demurrer.

United States Circuit Court, Southern Dist. of Ohio, Western Division.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Plaintiff,
vs.
LEVI SCOTT *et al.*, Def'ts.

Demurrer to answer.

11 Now comes David Armstrong, receiver of the Fidelity National Bank, and demurs to the answer of Levi Scott, one of the defendants herein, because the facts stated do not constitute a defense and is [are] insufficient in law.

E. W. KITTREDGE AND
W. B. BURNET,
Att'ys for Pl'ff.

And afterwards, to wit, on the 5th day of March, A. D. 1888, the following demurrer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Demurrer.

United States Circuit Court, Southern District of Ohio, Western Division.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank,
vs.
LEVI SCOTT *et al.*, Defendants. } No. 4067.

Demurrer to answer.

Now comes David Armstrong, receiver of the Fidelity National Bank, and demurs to the answer of the Farmers' and Merchants' State Bank, one of the defendants herein, because—

First. The counter-claim mentioned by said defendant in its answer does not arise out of the contract or transaction set forth in plaintiff's petition as the foundation of his claim, nor is it connected with the subject of this action.

12 Second. The counter-claim or set-off does not state facts sufficient to entitle the defendant to the relief demanded.

E. W. KITTREDGE AND
W. B. BURNET,
Attorneys for Plaintiff.

And afterwards, to wit, on the 21st day of March, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal X, p. 562.

By consent of parties leave is given to the defendant, The Farmers' and Merchants' State Bank, to file its amended answer herein.

United States Circuit Court, Southern District of Ohio, Western Division.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio, Plaintiff,

vs.

LEVI SCOTT and THE FARMERS' AND MERCHANTS' STATE BANK, Defendants.

Separate and amended answer of The Farmers' and Merchants' State Bank.

13 Now comes the defendant, The Farmers' and Merchants' State Bank, and, by way of amendment of the separate answer to plaintiff's complaint and by way of set-off, says that it now is and for more than one year last past has been a corporation duly organized under the laws of the State of Indiana and doing a general banking business in the town of Fairmount, county of Grant, State of Indiana.

This defendant admits the execution and endorsement of the note sued on in plaintiff's complaint, set out in the manner and form following: That, prior to the execution of the note sued on, desiring to negotiate a loan of and from the said The Fidelity National Bank, it made to said Fidelity National Bank a writing, its petition and request for such loan; that it was subsequently agreed in writing by and between said parties that the Fidelity National Bank of Cincinnati should loan to this defendant the sum of ten thousand dollars ($10,000), payable in 90 days after date, with interest at the rate of 7 per centum per annum; that the money so borrowed, less the discount, should be placed to the credit of the Farmers' and Merchants' State Bank at, with, and upon the books of the said Fidelity National Bank; that pursuant to said agreement the said Fidelity National Bank sent to the said The Farmers' and Merchants' State Bank the note set out in plaintiff's complaint, and at the same time in writing requested and directed that the defendant,

14 Levi Scott, should sign the same as maker, and that the same should be made payable to and endorsed by this defendant, all of which was done in pursuance of the written direction and agreement of the said Fidelity National Bank; that said note was so made, signed, and endorsed, as appears, at the request of the said The Fidelity National Bank, and was taken and received by it under the agreement that the said note was the obligation of the said The Farmers' and Merchants' State Bank only, and that it would look to said bank for the payment of the same and not to the defendant, Levi Scott, who signed the same as maker without con-

sideration, and merely for the purpose of complying with a custom of the Fidelity National Bank requiring two names upon paper discounted by it.

That no consideration of any kind or description ever passed from this defendant to Levi Scott for said note, and that the same was at the time and still is the note of this defendant; all of which the Fidelity National Bank at the time it received the said note well knew.

That the only consideration for said note was to this defendant, and when said note was so received by the Fidelity National Bank in consideration therefor the said Fidelity National Bank placed to the credit of this defendant the sum of nine thousand eight hundred and nineteen dollars and seventeen cents ($9,819.17), being the amount of said note, less the discount thereon, and that the same remained on deposit at said bank, subject to the order of this defendant only, to meet any check or drafts made upon them by this plaintiff and to pay and meet said note when the sum became
15 due.

That afterwards defendant drew on said Fidelity National Bank its check in the sum of one hundred and nine dollars and twenty-three cents ($109.23), which was paid, and the balance, to wit, the sum of $8,809.94, was permitted to remain with said Fidelity National Bank to meet a like amount to become due upon said note, and that the means of this defendant were being and have been accumulated and deposited in said bank to take up and meet the balance due on said note at maturity; that at the time the receiver herein was appointed there remained in said The Fidelity National Bank, to the credit of this defendant, to meet said note the sum of $8,809.94, which has in no manner been paid.

That at the maturity of said note and before the commencement of this action this defendant tendered to the receiver of the Fidelity National Bank, the plaintiff herein, the sum of $1,190.06, the balance due on said note, which tender was by the receiver, plaintiff herein, refused; and this defendant avers that ever since said time it has kept said sum set apart for the payment of said balance, and is now ready and willing to pay the same. It now brings into this court for the plaintiff the sum of eleven hundred ninety dollars and six cents ($1,190.06), the balance due said plaintiff on said note after deducting the amount due this defendant and on deposit in said bank at the time said bank failed and ceased to do business.

This defendant therefore prays that said sum of $8,809.94
16 may be allowed to it by way of set-off on said note; that it may have judgment accordingly; that said receiver be ordered and directed to credit said sum on said note and to receive said sum of $1,190.06, heretofore tendered to him, in full payment of the balance due on said note.

PAXTON & WARRINGTON, *Att'ys.*

Verification waived.

W. B. BURNET,
Att'y for Plaintiff.

And afterwards, to wit, on the 21st day of March, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal X, p. 562.

By consent of parties leave is given to the defendant, Levi Scott, to file his amended answer herein.

United States Circuit Court, Southern District of Ohio, Western Division.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio, Plaintiff,

vs.

LEVI SCOTT and THE FARMERS' AND MECHANICS' [MERCHANTS'] STATE BANK, Defendants.

Separate and amended answer of Levi Scott.

17 First. Now comes Levi Scott, defendant herein, and, by way of amendment to the answer filed herein, says that he admits the execution of the note sued upon and in plaintiff's complaint set out, and he avers that the same was so executed by him without any consideration whatever, and that the Fidelity National Bank of Cincinnati, Ohio, well knew the fact that the same was so executed at the date hereof and at all times since, and took said note with full knowledge of the fact, and that the same was so executed by this defendant without any consideration whatever.

Second. By way of further amendment to the separate answer filed herein the defendant, Levi Scott, says that on the 28th day of May, 1887, his codefendant, The Farmers' and Merchants' State Bank of Fairmount, Indiana, was and still is a corporation doing a general banking business under and pursuant to the laws of the State of Indiana, and had been so engaged for one year prior to said day; that during all of said time he, the said defendant, was and still is cashier for said corporation, all of which the said The Fidelity National Bank at all times well knew; that prior to the 6th day of June, 1887, said Farmers' and Merchants' State Bank, desiring to negotiate a loan of and from the said The Fidelity National Bank, made to said bank, in writing, its petition and request for such loan.

18 That it was subsequently, in writing, agreed by and between said banks that the Fidelity National Bank of Cincinnati, Ohio, should loan to the Farmers' and Merchants' State Bank of Fairmount, Indiana, the sum of ten thousand ($10,000) dollars, payable in 90 days after date, with interest at the rate of seven per cent. per annum; that the money so borrowed, less the discount, should be placed to the credit of the Farmers' and Merchants' State Bank at, with, and upon the books of the said Fidelity National Bank.

That this defendant at no time had any interest in said loan and

in no manner procured the same upon his own account, all of which the Fidelity National Bank at the time well knew; that pursuant to said agreement the said Fidelity National Bank sent to the said The Farmers' and Merchants' State Bank the note set out in the plaintiff's complaint, and at the same time, in writing, requested and directed that he, the said defendant, should sign the same as maker, and that the same should be made payable to and endorsed by the Farmers' and Mechanics' [Merchants'] State Bank, which he, the said defendant, caused to be done in pursuance of the written directions and agreement of the said The Fidelity National Bank; that the said note was so signed and executed by him (except as to the date thereof, which was left blank, which blank was filled up by the said Fidelity National Bank after the same was returned to it by mail) with the knowledge of and at the special instance and request,
19 in writing, of the said Fidelity National Bank; that said bank took the same at the time under the agreement that the said note was the obligation of the said The Farmers' and Merchants' State Bank only, and that it would look to said bank for the payment of the same and not to this defendant, well knowing that the defendant executed the same without consideration and merely for the purpose of complying with a custom of the Fidelity Bank requiring two names upon paper discounted by it.

Defendant further avers that said ten thousand dollars, less the discount thereof, was by the said Fidelity National Bank placed to the credit of the said Farmers' and Merchants' State Bank; that the said defendant never in any manner received any part of the consideration for said note; that said note was so drawn payable to the order of the said Farmers' and Merchants' State Bank and signed by him at the request of the Fidelity National Bank and under the agreement, in writing, made by said bank, as hereinbefore stated; that no consideration of any kind or description ever passed to him from the said Farmers' and Merchants' State Bank or from the said Fidelity National Bank to him; that the same was so executed by him without any consideration and under and in pursuance of the written agreement aforesaid, and that the said Fidelity National Bank well knew the fact at the time it was so executed and at the time said note was discounted and the proceeds placed to the credit of the said The Farmers' and Merchants' State Bank.

20 This defendant, having fully answered, asks to be dismissed with his costs.

PAXTON & WARRINGTON,
Att'ys for Levi Scott.

Verification waived.

W. B. BURNET,
Att'y for Plaintiff.

And afterwards, to wit, on the 3rd day of September, A. D. 1888, the following opinion was filed in the clerk's office of said court, clothed in the words and figures following, to wit, and the same was refiled December 21, 1888:

Opinion of Judge Sage.

21 U. S. Circuit Court, S. D. O., Western Division.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank,
vs.
LEVI SCOTT *et al.*
} No. 4067.

SAGE, *Judge:*

The plaintiff's action is upon a promissory note for ten thousand dollars, made by the defendant Scott and discounted by the Fidelity National Bank for account of the indorser, the defendant, The Farmers' and Mechanics' [Merchants'] State Bank. The note came to the possession of the plaintiff before its maturity.

The amended answer of Scott is that at the request of his codefendant, he being its cashier, he signed the note as maker without consideration, and solely to enable his codefendant to have it discounted, all of which was at the time known to the Fidelity National Bank.

In other words, Scott was an accommodation maker, and that fact was at the time known to the Fidelity Bank. This is no defense. The answer also sets up that the Fidelity Bank took the note under an agreement that it was the obligation of the defendant bank, and that the Fidelity Bank would look to said bank only for pay-
22 ment, but it appears from the answer that this agreement is evidenced by correspondence between the Fidelity Bank and the defendant bank prior to the signing of the note, which is fatal to the plea, as is also the fact that the agreement is in conflict with the note.

The amended answer of the defendant bank sets up the facts pleaded by its codefendant, Scott, who, it alleges, signed the note as maker "without consideration and merely for the purpose of complying with a custom of the Fidelity National Bank requiring two names upon paper discounted."

These allegations establish, as against the demurrer, that the defendant bank is the principal debtor, and that Scott, although the maker, is only a surety.

The answer further sets up that the proceeds of the discount of the note were placed by the Fidelity Bank to the credit of the defendant bank, subject to check or draft, "and to pay and meet said note when the same became due;" that the defendant bank drew upon said proceeds for $1,009.23, leaving a balance of $8,809.94, which has not been drawn against, and that at the maturity of the note defendant tendered to the plaintiff the sum of $1,190.06, the balance due on the note, after deducting said sum of $8,809.94, which "was permitted to remain with said Fidelity National Bank to meet a like amount to become due upon said note." The tender was refused, and the defendant now brings into court said balance for the

plaintiff, and prays that the $8,809.94 may be allowed by way
23 of set-off against the note.

The plaintiff demurs to each of these answers for insufficiency.

The question suggested upon the argument of the demurrers, whether the defendant bank, being the indorser, is entitled to plead the set-off, is disposed of by the finding already made, that the defendant bank is in fact the principal debtor.

It is contended for the defendant bank that the receiver took the note subject to all equities. That is true as to all equities in favor of the defendant bank and against the note at the time when the receiver took possession. The note was not then due. When it was delivered to the Fidelity National Bank and the proceeds credited to the defendant bank the note and the proceeds thereby became at once separate, distinct, and altogether independent each of the other. The fact that the defendant bank voluntarily left the greater portion of the proceeds on deposit to be applied toward payment of the note did not create an equity against the note, for the defendant retained the right to draw out the entire balance at any time.

In Hade *v.* McVey, 31 O. S., 231, the supreme court of Ohio holds that the receiver of a national bank holds to the bank and its creditors the relation, substantially, of a statutory assignee, and that "a right of set-off, perfect and available against the bank at the time of his appointment as receiver, is not affected by the bank's
24 insolvency. He succeeds only to the rights of the bank existing at the time it goes into liquidation."

The provision of the Ohio Code of Civil Procedure that "when cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated, so far as they equal each other," does not apply to the assignment of a demand before its maturity.

Mr. Pomeroy, in his work on Remedies and Remedial Rights, says, at section 163:

"If an insolvent holder of a claim not yet matured assigns the same before maturing, and the debtor, at the time of this transfer, holds a similar claim against the assignor, which is then due and payable, his right of set-off against the assignee, when the latter's cause of action arises, is preserved and protected."

Numerous cases are cited in support of this rule, which is said to be founded upon equitable considerations; but it does not apply here, for the reason that the national bank law, recognizing only the Government and the bank-note holders as preferred creditors, makes all payments of money by a national bank to its shareholders or creditors, after the commission of an act of insolvency, or in contemplation thereof, "with a view to prevent the application
25 of its assets in the manner prescribed by this chapter or with a view to the preference of one creditor to another, except in

payment of its circulating notes," utterly null and void. Rev. Stat. U. S., sec. 5242.

The provisions of sections 5234 and 5236 require the receiver to take possession of the assets of the bank, collect all debts, sell all property, real and personal, and pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, whose duty it is, after refunding to the United States any deficiency in redeeming the notes of the bank, to make a ratable dividend of the money among the creditors.

The unmistakable force and meaning of the law is to place all unsecured creditors upon the same footing of equality. When the plaintiff was appointed receiver the defendant was in the list of unsecured depositors, to whom payment, the bank being insolvent, was prohibited. The defendant had then no right of set-off, nor any equity against its notes, not then matured, which passed to the receiver. To allow the set-off, now that the note has matured, and thereby make payment in full to the defendant in part discharge of its obligation to the bank, would be contrary not only to the policy of the law, but also to the plain meaning of its provisions. See Venango Nat'l Bank *vs.* Taylor, 56 Penn. State, 14.

26 The demurrers are sustained. Judgment will be entered in favor of the plaintiff for the amount claimed in the petition against the defendant bank as principal and the defendant Scott as surety.

The circuit judge concurs in the conclusions of this opinion, which is in accord with his opinion on file at Cincinnati in the case of The National Bank Co. *vs.* Armstrong, receiver.

GEO. R. SAGE,
U. S. District Judge.

E. W. Kittredge and W. B. Burnet, att'ys for plaintiff.

Paxton and Warrington, att'ys for defendants.

27 And afterwards, to wit, on the 21st day of December, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, p. 144.

Leave is granted to plaintiff to file demurrers to the separate amended answers of the two defendants herein, which is accordingly done.

And afterwards, to wit, on the 21st day of December, A. D. 1888, the following demurrer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Demurrer.

Circuit Court of the United States, Southern Dist. of Ohio, Western Division.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio, Plaintiff,
vs.
LEVI SCOTT and THE FARMERS' AND MERCHANTS' BANK, Def'ts.
} No. 4067.

Demurrer of the plaintiff to the separate amended answer of Levi Scott.

Now comes David Armstrong, receiver of the Fidelity National Bank, plaintiff above named, and demurs to the separate amended answer of Levi Scott, one of the defendants herein, upon the ground that the facts stated in the said amended answer do not constitute a defense to the cause of action set forth in plaintiff's petition
28 herein and are insufficient in law.

KITTREDGE & WILBY,
W. B. BURNET,
Attorneys for Plaintiff.

And afterwards, to wit, on the 21st day of December, A. D. 1888, the following demurrer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Demurrer.

Circuit Court of the United States, Southern Dist. of Ohio, Western Division.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio, Plaintiff,
vs.
LEVI SCOTT and THE FARMERS' AND MERCHANTS' BANK, Def'ts.
} No. 4067.

Demurrer of the plaintiff to the separate amended answer of the Farmers' and Merchants' State Bank.

Now comes David Armstrong, receiver of the Fidelity National Bank, and demurs to the separate amended answer of The Farmers' and Merchants' State Bank, one of the defendants herein, upon the following grounds:

First. That said amended answer does not state facts sufficient to constitute a defense to the cause of action set forth in the plaintiff's petition.

29 Second. That the matters and things set forth in said amended answer do not constitute a valid set-off against the cause of action set forth in the plaintiff's petition, and do not entitle the defendant to the relief demanded by the defendant in his said amended answer.

KITTREDGE & WILBY,
W. B. BURNET,
Attorneys for Plaintiff.

And afterwards, to wit, on the 22nd day of December, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, p. 144.

This day this cause came on to be heard upon the demurrers of the plaintiff to the separate answers of the defendants and upon the demurrers of the plaintiff to the separate amended answers of the defendants, and was argued by counsel and submitted to the court; upon consideration whereof the court finds that said demurrers to each of said answers are well taken, and sustains the same.

And thereupon, the defendants and each of them failing to plead further, the court finds upon the pleadings that said plaintiff is the holder and owner of the note for ten thousand dollars ($10,000) described in the petition; that said note was not paid at its maturity, and was thereupon duly presented for payment, and, upon payment being thereupon refused, notice of such non-payment was duly
30 given to the defendant, The Farmers' and Merchants' State Bank, as indorser; that the said Farmers' and Merchants' State Bank of Indiana is liable thereon as principal and the said Levi Scott as surety; that said note is wholly unpaid and the defendants are indebted to the plaintiff thereon in the sum of ten thousand eight hundred and thirty-three and $\frac{33}{100}$ dollars ($10,833.33), which included interest, as prayed for, down to October 2, 1888, the first day of this term, at eight per cent. per annum.

It is therefore considered and adjudged by the court that the counter-claim or set-off of the defendants or either of them be disallowed and dismissed, and that the said plaintiff recover from the said defendants in the sum of $10,833.33 (ten thousand eight hundred and thirty-three and $\frac{33}{100}$ dollars) so found due and interest thereon, at the rate of eight per cent. per annum, from the 1st day of this term, together with his costs herein expended, taxed at $——; to the sustaining of said demurrers and the findings and judgment of the said court the defendants except.

And afterwards, to wit, on the 24th day of January, A. D. 1889, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, page 176.

The defendants now come and give notice of their intention to prosecute in the Supreme Court of the United States a writ of error to reverse the findings and judgment herein, and the court allows a writ of error to the Supreme Court, with stay of execution, upon the filing of a supersedeas bond in the sum of twenty-two thousand dollars, with good and sufficient sureties, conditioned according to law, and said bond being now presented by the defendants in the sum of twenty-two thousand dollars the same is hereby approved.

And afterwards, to wit, on the 24th day of April, A. D. 1889, the following supersedeas bond was filed in the clerk's office of the said court; said bond is in the words and figures following, to wit:

Supersedeas Bond.

Circuit Court of the United States, Southern District of Ohio, Western Division, *ss:*

DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio,

vs.

LEVI SCOTT *et al.*

Know all men by these presents that we, Levi Scott, The Farmers' and Merchants' State Bank of Indiana, as principals, and Levi Scott, Alphens Henley, Jonathan P. Winslow, Harman D. Reasoner, G. R. Thurston, Jeremiah Howell, Phil. Matter, and James Johnson, are held and firmly bound unto David Armstrong, receiver of the Fidelity National Bank of Cincinnati, Ohio, in the sum of twenty-two thousand dollars, to be paid to the said David Armstrong, receiver as aforesaid, his successors and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 8th day of January, 1889.

Whereas the above-named Levi Scott and the Farmers' and Merchants' State Bank of Indiana have filed a petition in error to the Supreme Court of the United States against said David Armstrong, receiver of the Fidelity National Bank, to reverse the judgment of and finding rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above-named Levi Scott and the Farmers' and Merchants' State Bank of Indiana shall prosecute their said petition in error to effect and answer all damages — costs if they shall fail to make good

said plea, then this obligation to be void; otherwise to remain
33 in full force and virtue.

FARMERS' & MERCHANTS' STATE BANK,
Per LEVI SCOTT, *Cashier.* [SEAL.]
ALPHONSA HENLEY, *President.* [SEAL.]
LEVI SCOTT. [SEAL.]
ALPHONSA HENLEY. [SEAL.]
JONATHAN P. WINSLOW. [SEAL.]
HARMAND D. REASONER. [SEAL.]
GEO. R. THURSTON. [SEAL.]
JEREMIAH HOWELL. [SEAL.]
PHIL. MATTER. [SEAL.]
JAMES JOHNSON. [SEAL.]

Sealed and delivered in presence of—

——— ———.

The above security is approved.

GEORGE R. SAGE,
District Judge of the United States, S. D. O.

34 STATE OF INDIANA, } ss:
County of Grant, }

I, Phil. Matter, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth one hundred thousand dollars in real estate in my own name, situate in the county [counties] of Grant and Madison, in said district.

PHIL. MATTER.

Sworn to before me the 8th day of January, 1889.

WM. C. WINSLOW,
Notary Public in and for said County and State. [SEAL.]

STATE OF INDIANA, } ss:
County of Grant, }

I, Jeremiah Howell, one of the sureties above named, do solemnly affirm that after paying my just debts and liabilities I am worth ten thousand dollars in real estate in my own name, situate in the county of Grant, in said State.

JEREMIAH HOWELL.

Sworn to before me the 8th day of January, 1889.

WM. WINSLOW,
Notary Public in and for said County and State. [SEAL.]

35 STATE OF INDIANA, } ss:
County of Grant, }

I, George R. Thurston, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth three thousand dollars in real estate in my own name, situate in the county of Madison, in said State.

GEORGE R. THURSTON.

Sworn to before me the 8th day of January, 1889.

WM. C. WINSLOW,

[SEAL.] *Notary Public in and for said County and State.*

STATE OF INDIANA, } ss:
County of Grant, }

I, Alphonse Henley, one of the sureties above named, do solemnly affirm that after paying my just debts and liabilities I am worth ten thousand dollars in real estate in my own name, situate in the county of Grant, in said State.

ALPHONSA HENLEY.

Affirmed to before me the 8th day of January, 1889.

WM. C. WINSLOW,

[SEAL.] *Notary Public in and for said County and State.*

36 STATE OF INDIANA, } ss:
County of Grant, }

I, James Johnson, one of the sureties above named, do solemnly affirm that after paying my just debts and liabilities I am worth seventy-five thousand dollars in real estate in my own name, situate in the county of Grant, in the State of Indiana.

JAMES JOHNSON.

Affirmed to before me the 8th day of January, 1889.

WM. C. WINSLOW,

Notary Public in and for said County and State. [SEAL.]

STATE OF INDIANA, } ss:
County of Grant, }

I, Harmon D. Reasoner, one of the sureties above named, do solemnly affirm that after paying my just debts and liabilities I am worth five thousand dollars in real estate in my own name, situate in the county of Grant, in the State of Indiana.

H. D. REASONER.

Affirmed to before me the 8th day of January, 1889.

WM. WINSLOW,

Notary Public in and for said County and State. [SEAL.]

37 STATE OF INDIANA, } ss:
County of Grant, }

I, Levi Scott, one of the sureties above named, do solemnly affirm that after paying my just debts and liabilities I am worth fifteen thousand dollars in real estate in my own name, situate in the county of Grant, in said State of Indiana.

LEVI SCOTT.

Affirmed to before me the 8th day of January, 1889.

WM. C. WINSLOW,

[SEAL.] *Notary Public in and for said County and State.*

STATE OF INDIANA, } ss:
County of Grant, }

I, Jonathan P. Winslow, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth fifteen thousand dollars in real estate in my own name, situate in the county of Grant, in said State of Indiana.

JONATHAN P. WINSLOW.

Affirmed to before me the 8th day of January, 1889.

WM. C. WINSLOW,

[SEAL.] *Notary Public in and for said County and State.*

I consider this bond amply sufficient for the amount of liability to be incurred.

LEON O. BAILEY,
Ass't U. S. Attorney.

Jan'y 9th, 1889.

38 And afterwards, to wit, on the 28th day of January, A. D. 1889, the following error to the United States circuit court was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Error, &c.

In the Supreme Court of the United States.

LEVI SCOTT and THE FARMERS' AND MERCHANTS' STATE BANK OF INDIANA, Plaintiffs in Error,

vs.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank, Cincinnati, Ohio, Defendant in Error.

Error to the United States circuit court, southern district of Ohio, western division.

At the October term of the year of our Lord eighteen hundred and eighty-nine, to wit, on the second Monday of October in said term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said Levi Scott and The Farmers' and Merchants' State Bank of Indiana, by their attorneys, Thomas B. Paxton and John W. Warrington, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

39 1. That the court below erred at the trial of said cause in sustaining the demurrer of the said David Armstrong, re-

ceiver as aforesaid, to the amended answer of the said Levi Scott, to which the plaintiffs in error at the time excepted.

2. That the court below erred at the trial of the said cause in sustaining the demurrer of the said David Armstrong, receiver, to the amended answer of the said Farmers' and Merchants' State Bank of Fairmount, Indiana, to which the plaintiffs in error excepted at the time.

3. That the court below erred at the trial of said cause in sustaining said demurrers and in rendering judgment against said Levi Scott and the Farmers' and Merchants' State Bank of Fairmount, Indiana, in favor of said David Armstrong, receiver, to which the plaintiffs in error then and there objected and excepted, and the said plaintiffs in error pray that said findings and judgment aforesaid be reversed, annulled, and altogether held for naught, and that they may be restored to all things which they have lost by reason and occasion of said judgment.

40 THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Western Division, }

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing is a complete and true transcript of the proceedings had by and before the said court in the above-entitled cause, as the same appears of record and on file in the clerk's office of said court.

Seal of the Circuit Court, South'n Dist. of Ohio.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, O., on the 28th day of January, A. D. 1889.

B. R. COWEN, *Clerk*,
By R. C. GEORGI, *Deputy*.

41 THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between David Armstrong, receiver of the Fidelity National Bank of Cincinnati, Ohio, and Levi Scott and Farmers' and Merchants' State Bank, a manifest error hath happened, to the great damage of the said Levi Scott and Farmers' and Merchants' State Bank, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United

States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Circuit Court, South'n Dist. of Ohio.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 24th day of January, 1889, in the year of our Lord one thousand eight hundred and eighty-nine.

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.

[Endorsed:] United States circuit court, S. D. O., W. D. No. 4067. D. Armstrong, receiver, *vs.* Levi Scott *et al.* Writ of error. Filed Jan'y 24, 1889. B. R. Cowen, clerk.

42 THE UNITED STATES OF AMERICA, *ss:*

To David Armstrong, receiver of the Fidelity National Bank of Cincinnati, Ohio, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein Levi Scott and Farmers' and Merchants' State Bank — plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Seal of the Circuit Court, South'n Dist. of Ohio.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 24th day of January, in the year of our Lord one thousand eight hundred and eighty-nine.

GEORGE R. SAGE,
U. S. District Judge within and for the Southern District of Ohio, Sitting and Holding Circuit Court, there Being no Circuit Judge or Associate Justice in the District.

43 [Endorsed:] 1, 24, '89. United States circuit court, S. D. O., W. D. No. 4067. D. Armstrong, receiver, *vs.* Levi Scott *et al.* Citation to defendant in error. Filed Jan'y 25, 1889. B. R. Cowen, clerk.

Received this writ at Cincinnati, Ohio, on the 24th day of January, 1889, and at said Cincinnati, on the same day, I served the within-named David Armstrong, receiver of the Fidelity National

Bank of Cincinnati, Ohio, with a true copy of this writ, having all the endorsements thereon.

H. C. URNER,
U. S. Marshal,
By RICHARD C. ROHNER, *Dept.*

Service	$2 00
Copy	50
1 mile	06
	$2 56

Endorsed on cover: S. Ohio C. C. U. S. No. 1173. Levi Scott and The Farmers' and Merchants' State Bank, plaintiffs in error, *vs.* David Armstrong, receiver of the Fidelity National Bank of Cincinnati, Ohio. Filed July 10, 1889.